Supreme Court, U.S.
FILED
NOV 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-632

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHARLES ATKINS, Commissioner
of the Massachusetts
Department of Public Welfare,

Petitioner,

v.

SANTOS RIVERA, Madeline McKenna,
and all others similarly situated,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF AUTHORITIES

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1. The respondents concede that there is a conflict on an important federal question. They seek to avoid review through the diversionary, and misleading, tactic of asserting likely congressional resolution.

There is no legislation pending in Congress which would amend 42 U.S.C.

§ 1396a(a)(10)(C)(i)(III) or otherwise affect this case.

Moreover, the moratorium[1/] relied upon by the Brief in Opposition at 3 has nothing to do with the issue presented here. It is a moratorium upon the imposition of "quality control" sanctions by the Secretary of Health and Human Services pursuant to what Congress thinks may be an overly strict application by HHS of the "same methodology" language. By regulation since the inception of Medicaid, the Secretary has always permitted flexibility to the States regarding the length of a spenddown period, and she did not change this position after the "same methodology" language was enacted. She argued, successfully,

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1/ P.L. 98-369, § 2373(c), 98 Stat. 494, 1112; see Pet. 30, n. 16.

in Hogan v. Heckler, 769 F.2d 886 (1st Cir. 1985) and in DeJesus v. Perales, 770 F.2d 316 (2d Cir. 1985), that "same methodology" has nothing to do with the length of the spenddown period.

Congress agrees with the Secretary (and the federal courts of appeals) that the length of the spenddown is not encompassed by the "same methodology" provision. See Pet. 28-30. Therefore, so far as Congress is concerned there is little reason to "reexamine" this issue.[2/] It is unlikely that the Secretary's report to Congress[3/] will even address this matter, which is com-

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2/ H.R. 1868, § 9 (99th Cong., 1st Sess.), relied upon by the Opposition at 4, would merely clarify the scope of the moratorium. The respondents' other legislative references, id., simply document the enactment of the "same methodology" provision.

3/ Called for by P.L. 98-369, § 2373(c).

completely separate from the concerns Congress expressed in seeking the report.[4/] It would be entirely fortuitous if any legislation enacted at the end of the moratorium period affected the question presented here.[5/]

4/ Id.; see H.R. Rep. No. 98-861, 98th Cong., 2d Sess., 1366-67, reprinted in 1984 U.S. Code Cong. & Admin. News 697, 2054-55.

5/ Moreover, there is no indication that HHS will submit a report in the near future; and since Congress by the moratorium has given itself 18 months after receipt of the report to react, it is unlikely that any congressional attention even to the questions addressed therein would occur before mid-1987.

In contrast, this case will certainly be heard this term if certiorari is granted without asking for the views of the United States. There appears to be little reason to ask for those views, since the Secretary's wholehearted support of the petitioner's position is already plainly attested to by her arguments in Hogan and DeJesus that a six-month spenddown always has been, and remains, legal and, indeed, expressly authorized by her regulation.

2. While paying lip service to the assertion that the decision below was correct, the respondents assiduously avoid any mention of the Secretary's governing regulation,[6/] and utterly fail to discuss the legislative history which makes clear that the congressional intent was not to invalidate, but to reaffirm that regulation. See Pet. 28-31.[7/]

6/ The reference to the Secretary's substantive -- not financial -- eligibility regulation, 42 C.F.R. § 435.401, which clearly does not apply, is another red herring. See Hogan, supra, 769 F.2d at 894, n. 15.

7/ In yet another diversionary move, the Brief in Opposition at 9 raises a new wrinkle on an issue which was not reached below (42 U.S.C. § 1396a(a)(17)) but was rejected in DeJesus and in Hogan. The wrinkle was not even raised below; it was specifically rejected, however, in Hogan, 769 F.2d at 888 n. 2 and 896.

Actions speak louder: the plaintiff classes in Hogan and DeJesus, represented by the same counsel as respondents here, have decided not to seek review in this Court despite the serious adverse impact of those decisions on them. Brief in Opposition at 4, n.*. Since those cases, as this one, are part of a serious and direct conflict on an important federal question, it seems quite clear that this decision follows from a judgment that this Court, upon such review, would determine that they were correctly decided, in contrast to the decision below.

The petitioner respectfully suggests that this Court might appropriately consider summary reversal.

Respectfully submitted,

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Date: November 15, 1985